Filed 8/24/04 P. v. Carpenter CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARCELLUS CARPENTER, Defendant and Appellant.	A102445 (San Francisco County Super. Ct. No. 183683)

Marcellus Carpenter was apprehended shortly after he mugged a 61-year-old woman in a San Francisco BART station.[1] A jury found Carpenter guilty of robbery, battery with serious bodily injury, and assault, and also found him guilty of all lesser included offenses for these charges. In addition, the jury found him guilty of a separate charge of receiving stolen property. On appeal, Carpenter argues: (1) he was wrongly convicted of both greater offenses and their lesser included offenses for three of the charges; (2) he was wrongly convicted of both robbery and receiving property stolen in the robbery; and (3) his sentence for battery should have been stayed pursuant to Penal Code section 654[2] because it arose from the same course of conduct as the robbery. The Attorney General concedes the first two arguments and disputes only Carpenter's challenge to the battery sentence. We reverse the convictions for receiving stolen

---

1 "BART" is an acronym for Bay Area Rapid Transit, the San Francisco Bay Area's subway train system.

2 All statutory references are to the Penal Code unless otherwise indicated.

property and for the lesser included offenses. We also conclude the battery sentence should have been stayed pursuant to section 654.

BACKGROUND

In the summer of 2001, Beverly Sanders, a resident of Georgia, was visiting her son in San Francisco. Around 7:00 p.m. on July 15, 2001, Sanders' son dropped her off at a BART station in the Civic Center area of San Francisco, where she intended to catch a train to visit a friend. As Sanders walked downstairs into the station, carrying her suitcase, computer and purse, a man slid down the stair railing and struck a hard blow to the back of her head. Sanders stopped, dropped her suitcase and asked, "Why did you do that?" The man grabbed at the purse around Sanders' arm, but she held on. He then hit Sanders in the head again, "stomped" on her leg and hit her in the chin, saying "I want your purse, give it to me." When he tried to escape with the purse, the strap twisted around Sanders' neck and was choking her. Sanders lost consciousness briefly until the purse strap broke. Before fleeing with her purse, the assailant pushed Sanders forward, causing her to lose her balance and stumble down the stairs.

A witness to the assault flagged down two San Francisco police officers who were on bicycle patrol in United Nations Plaza, near the BART station. The witness pointed out Carpenter, who was running down the street with a purse draped over his shoulder. The officers pursued Carpenter and eventually detained him at gunpoint. They then returned with Carpenter to the BART station, where they found Sanders lying on the ground. She had a large gash on her cheek and a couple of large bleeding contusions on the back of her head. In a "cold show" (i.e., a face-to-face identification at the scene, without a lineup of other potential suspects), Sanders identified Carpenter as her attacker. She also identified as hers the purse that was recovered from Carpenter. Sanders received seven stitches to close the gash in her cheek, and she suffered headaches and dizziness for over a month after the assault.

Carpenter was charged with robbery (§ 212.5, subd. (c)), battery resulting in serious bodily injury (§ 243, subd. (d)), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), receiving stolen property (§ 496, subd. (a)), and

possession of drug paraphernalia (Health & Saf. Code, § 11364).[3] The information also alleged enhancements for causing great bodily injury and alleged Carpenter had suffered three prior felony convictions within the meaning of section 667.5, subdivision (b).

Several witnesses to the robbery testified at trial. Jeffrey Dutton, a BART technician, saw a "scuffle" on the stairs between a lady and a dark-skinned man. When Dutton saw Carpenter in a cold show, he told police he recognized the red jacket as one the attacker had worn. Margaret Koran, a transit supervisor, saw the incident while sitting in her parked car near the BART station. She heard a woman's screaming followed by a loud "thud," and then she saw an African-American male in a 49'er jacket run up the subway stairs with a purse around his neck. At the scene and at trial, Koran recognized Carpenter's jacket as the one she had seen on the assailant, and she was about 80 percent certain Carpenter was the person she saw running with the purse. Ron Harrison, a BART station agent who saw the assault, also described the attacker as a black male wearing a 49'er jacket. Harrison identified Carpenter as the assailant based on his matching attire and build. Sanders also repeatedly identified Carpenter in court as her attacker. The defense called no witnesses.

The jury found Carpenter guilty of all charges. After denying his new trial motion, the trial court sentenced Carpenter to a total of five years in prison. The court calculated the sentence as follows: three years for the robbery charge; one year for the battery charge, to be served concurrently; one year for the assault charge, stayed pursuant to section 654; eight months for the receiving stolen property charge, "permanently stayed" pursuant to section 654; and two one-year enhancements for Carpenter's prior convictions. This appeal followed.

DISCUSSION

I. Convictions for Lesser Included Offenses Will Be Reversed

The jury was instructed on the elements of all lesser included offenses of the three charges against Carpenter: grand theft and petty theft (lesser included offenses of

---

[3] The possession of drug paraphernalia charge was later dropped.

robbery); simple battery (a lesser included offense of battery with serious bodily injury); and simple assault (a lesser included offense of battery with serious bodily injury and of assault by means of force likely to produce great bodily injury). The trial court also instructed the jury with CALJIC No. 17.10, which explains that a defendant may not be convicted of both a greater crime and its lesser included offenses.[4] Despite this instruction, the jury returned verdict forms finding Carpenter guilty of all charges *and* all the lesser included offenses to the charges. Carpenter filed a new trial motion challenging these multiple convictions on double jeopardy grounds, but the motion was denied. Instead of vacating the convictions on the lesser offenses, the trial court called these convictions "a nullity" and stayed imposition of sentence pursuant to section 654.

The Attorney General concedes this procedure was inappropriate and Carpenter's convictions for the lesser included offenses must be reversed. It is well settled that "[a] defendant . . . cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act. [Citation.]" (*People v. Sanchez* (2001) 24 Cal.4th 983, 987.) The remedy when a properly instructed jury returns convictions on both greater and lesser offenses is reversal of the convictions on the lesser charges. The Supreme Court long ago explained: "When the jury expressly finds defendant guilty of both the greater and lesser offense, . . . there is no implied acquittal of the greater offense. If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed. [Citations.]" (*People v. Moran* (1970) 1 Cal.3d 755, 763.) Carpenter does not challenge the sufficiency of evidence supporting the greater charges, nor does he claim the jury was not properly instructed. (Contrast *Milanovich v. United States* (1961) 365 U.S. 551, 554-555 [new trial required because, after trial court refused to give a correct instruction, it was impossible to say what verdict the jury would

---

4 In relevant part, CALJIC No. 17.10 states: "Unless otherwise directed by me, you may not return a guilty verdict on a lesser crime, unless you also unanimously find and return a signed verdict of not guilty as to the related greater crime."

have rendered].) Accordingly, the appropriate remedy is a reversal of convictions on the lesser included charges. (*People v. Moran*, *supra,* at p. 763.)

II. Conviction for Receiving Stolen Property Will Be Reversed

Carpenter robbed Sanders of her purse and fled. Within minutes, he was captured by police officers, who recovered Sanders' purse. Based on these facts, Carpenter was convicted of both robbery and possession of stolen property. As the Attorney General concedes, both of these convictions cannot stand. The law prohibits a person from being convicted of both theft and receiving property stolen in the theft. (§ 496, subd. (a) [noting "no person may be convicted both pursuant to this section [of receiving stolen property] and of the theft of the same property"]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [referring to the "fundamental principle that one may not be convicted of stealing and of receiving the same property"].)

The trial court recognized Carpenter could not be convicted of both charges and, over Carpenter's objection, attempted to resolve the problem by staying the sentence imposed on the receiving stolen property count, ruling that this sentence would be "permanently stayed" after service of sentence on the robbery charge. Once again, however, the trial court's solution fell short. The Supreme Court found the same remedy inadequate in *People v. Jaramillo*, noting "[t]his treatment overlooks . . . the basic problem of whether defendant may properly be *convicted* of both charges . . . . [Citations.]" (*People v. Jaramillo*, *supra,* 16 Cal.3d at p. 757.) As both parties agree, the appropriate remedy is to reverse the conviction for receiving stolen property. (*People v. Stephens* (1990) 218 Cal.App.3d 575, 587.)

III. Sentence for Battery Should Have Been Stayed under Section 654

Finally, Carpenter argues his sentence for battery (which was set to run concurrently with his sentence for robbery) should have been stayed pursuant to section 654 because it was based on the same course of conduct as the robbery. Section 654 precludes multiple punishment for a single act or an indivisible course of conduct. (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592; *People v. Miller* (1977) 18 Cal.3d 873, 885.) " 'Whether a course of criminal conduct is divisible and therefore gives rise to

more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' (*Neal* [*v. State of California* (1960)] 55 Cal.2d [11,] 19, italics added.)" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) " 'The defendant's intent and objective are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced. [Citation.]' [Citation.]" (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

Carpenter argues the battery of Sanders had no objective other than the successful completion of the robbery. However, Sanders testified that *after* the purse strap broke, and "right before" Carpenter ran up the train station steps with her purse, "he took me and shoved me and pushed me forward, and I went stumbling forward, and I lost my balance and was about to fall down the stairs." Traditionally, acts of gratuitous violence against a helpless and unresisting victim have not been viewed as incidental to a robbery for purposes of section 654. (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 190-191 [collecting cases].) For example, in *People v. Nguyen*, an accomplice forced the victim to lie on the floor and shot him while the defendant emptied the store's till. (*Id.* at p. 190.) In another case, a defendant who had gathered the victim's valuables and was preparing to flee first murdered a person who entered the room and then ordered the victim to lie down and stabbed her in the back. (*People v. Coleman*, *supra,* 48 Cal.3d at p. 162.) The Supreme Court reasoned section 654 did not preclude punishment for both assault and robbery under these facts because the trial court could properly conclude the defendant committed the assault with the intent and objective of preventing the victim from sounding an alarm about the murder, and this intent and objective were separate from, not incidental to, the robbery. (*Id.* at pp. 162-163.)

However, even if the push Carpenter gave Sanders toward the stairs constituted a separate battery, and not merely force used to break free and escape from the scene of the robbery, Sanders' testimony about the push is not sufficient evidence to support separate punishment for a battery *with serious bodily injury*. Sanders testified only that she "went

stumbling forward," "stumbling down" and "was falling forward" from the push, but the prosecution offered no evidence that she suffered any injury—let alone serious bodily injury—as a result of the push. The only evidence of serious bodily injury presented at trial consisted of injuries Carpenter inflicted upon Sanders during the course of the struggle over the purse. Evidence about the final push, without resulting injury, is therefore not sufficient to support the trial court's implied finding that Carpenter committed a battery with serious bodily injury that was divisible from the robbery. The trial court should have stayed imposition of sentence on the battery charge pursuant to section 654.

DISPOSITION

The conviction in count four for receiving stolen property (§ 496, subd. (a)) is reversed. The convictions in counts one through three for lesser included offenses of grand theft (§ 487), petty theft (§ 484), simple battery (§ 242), and simple assault (§ 240) are also reversed. The judgment is modified to stay imposition of sentence in count two for battery with serious bodily injury (§ 243, subd. (d)). In all other respects, the judgment is affirmed.

_____
Parrilli, J.

We concur:

_____
Corrigan, Acting P. J.

_____
Pollak, J.